

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY MURRELL,

Defendant-Appellant.

UNPUBLISHED

January 22, 2004

No. 243807

Wayne Circuit Court

LC No. 02-000332

Before: Smolenski, P.J., and Saad and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree criminal sexual conduct, MCL 750.520b(1)(e) (weapon used), armed robbery, MCL 750.529 and first-degree home invasion, MCL 750.110a(2).¹ We affirm.

I. Basic Facts

On a December morning the victim, a seventy-eight year old woman, was home alone while her husband was out feeding their chickens as usual. Knowing the couple's daily routine, Richard Boone knocked on the victim's door purporting to sell gold. When the victim stated that she did not want any gold, Boone pushed his way into the home and called defendant to join him. Inside, defendant and Boone demanded that the victim give them money. While Boone looked around for other things to take, defendant pointed a gun at the victim and ordered her to remove her panties. Defendant tried to force her to perform fellatio, but she refused. Defendant then attempted vaginal intercourse with the victim. Although the endeavor was on the whole unsuccessful, the victim testified that defendant penetrated her to some extent. Defendant and Boone left the victim's house with some money, house keys, car keys, and several other items.

¹ Defendant was charged with alternative counts of CSC-1 MCL 750.520b(1)(c) (during a felony) or MCL 750.520b(1)(e) (weapon used) as well as armed robbery, first-degree home invasion, possession of a firearm by a felon, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b.

II. Effective Assistance of Counsel

Defendant first argues that he was denied effective assistance of counsel because defense counsel did not object or seek a curative instruction with regard to the police officer's testimony that defendant possessed drugs and drug paraphernalia and was driving a stolen car when he was arrested. We disagree.

Because defendant failed to preserve his claim of ineffective assistance of counsel by filing a motion for new trial or otherwise by creating a record in the trial court our review is limited to the existing record. *People v Rodgers*, 248 Mich App 702, 713-714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *Id.* at 714. To establish ineffective assistance of counsel a defendant must first show that counsel's performance fell below objective reasonableness and the deficiency was so prejudicial that he was deprived of a fair trial. To establish prejudice, there must be a reasonable probability that but for counsel's alleged errors the trial outcome would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

With regard to the drugs, defense counsel argued in closing that defendant's inculpatory statement was inaccurate because he was under the influence of drugs at the time it was made. Thus, it was a matter of trial strategy to allow the testimony regarding the drugs. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). A defense attorney is given great discretion regarding trial strategy and tactics. *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994). Merely because a decision was unsuccessful does not presume error. *Id.*

With regard to the stolen vehicle, there is no indication that there was any strategic reason for failing to object. But defendant has failed to show a reasonable probability that he would have been acquitted if the testimony had been objected to or a curative instruction had been given. The evidence showed that the victim had ample time to view defendant while they interacted in her home. Additionally, the stolen vehicle was only mentioned once in the testimony and the prosecutor did not mention it in closing argument. Therefore, we conclude that defendant was not denied effective assistance of counsel on this basis.

III. Continuance

Defendant also argues that he was denied a fair trial when the trial court admitted "last minute" testimony on DNA testing and denied defendant's request for a continuance. We disagree.

Although defendant's statement of the issue hints at an evidentiary issue, defendant does not actually argue that the evidence was inadmissible. In the lower court, defendant asked that the evidence be suppressed or that a continuance be granted because the evidence was provided to defendant the day before trial. But defendant did not argue that the evidence should have been suppressed for any reason other than it being "last-minute." On appeal, the only cases defendant cites in this regard address whether the trial court abused its discretion in refusing to reopen proofs after the parties rested. Here, the situation did not involve reopening proofs after the parties rested. Thus, we do not address whether the trial court erred in admitting the evidence, but rather, whether the trial court erred in denying defendant's request for a continuance.

This Court reviews the grant or denial of an adjournment for an abuse of discretion. *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000). In addition, a defendant must show prejudice as a result of the trial court's abuse of discretion. *Id.* This Court reviews claims of due process violations de novo. *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999). Not every denial of a request for a continuance violates due process. *People v Charles O Williams*, 386 Mich 565, 575; 194 NW2d 337 (1972), quoting *Ungar v Sarafite*, 376 US 575, 589; 84 S Ct 841; 11 L Ed 2d 921 (1964).

The trial court did not abuse its discretion in denying the continuance because defense counsel provided with ample time to interview the witness and prepare a cross-examination. The afternoon before the first day of trial, the prosecutor faxed defense counsel the expert report on the DNA evidence. On the first morning of trial, defense counsel requested either suppression of the testimony or a continuance arguing that defendant was entitled to his own expert or time to prepare a cross-examination of the prosecution's expert. The trial court asked the prosecutor to bring the witness in later that day to allow defense counsel time to interview her and prepare a cross-examination. The trial court ruled that the witness would not testify until the next day. The next day, defense counsel again objected to the expert's testimony, but the trial court noted that defense counsel indicated that he was satisfied with his interview with the expert the day before. The witness testified that samples taken from the victim matched all eight genetic markers of a sample taken from defendant. On cross-examination, defense counsel challenged the statistical theory on which the expert's opinion was based. Because defense counsel had adequate time to prepare his cross-examination of this witness, the trial court did not err in denying the continuance.

Even if the trial court had abused its discretion, defendant has failed to show that he was unfairly prejudiced by the evidence. The victim testified that defendant was in her house and in close proximity to her for several minutes. The victim also identified defendant in a physical lineup. Therefore, even without the DNA evidence, there was ample evidence to support defendant's conviction.

Affirmed.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Kirsten Frank Kelly